INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statutes involved	2
Statement	2
Argument	4
Conclusion	7
Appendix	8

CITATIONS

Cases:	
Bowers v. *Lawyers Mortgage Co.*, 285 U. S. 182	5, 6
Empire Title & Guarantee Co. v. *United States*, 101 F. (2d) 69	5
United States v. *Home Title Co.*, 285 U. S. 191	5, 6
Statutes:	
Revenue Act of 1934, c. 277, 48 Stat. 680:	
Sec. 204 (U. S. C., Title 26, Sec. 204)	8
Revenue Act of 1935, c. 829, 49 Stat. 1014:	
Sec. 105	8
Revenue Act of 1936, c. 690, 49 Stat. 1648:	
Sec. 204	9
Sec. 401	9
Miscellaneous:	
Hearings before the Temporary National Economic Committee (1940), Part 10–A, pp. 6, 7	7

411482–41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 514

COMMERCE TITLE GUARANTY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the District Court (R. 45–56) is reported in 32 F. Supp. 73. The Circuit Court of Appeals did not render an opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 6, 1941 (R. 169). The petition for a writ of certiorari was filed August 14, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a title guaranty company which derives more than half its gross income by renting space in

an office building owned and operated by it as authorized in its charter, and less than one fifth of its gross income from premiums on insurance policies issued by it, is an "insurance company" exempt from the capital stock tax under section 105 (c) of the Revenue Act of 1935, as amended.

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra,* pp. 8–9.

STATEMENT

The material facts as found by the District Court may be summarized as follows:

Petitioner was incorporated under the laws of Tennessee in 1934 as a consequence of the liquidation of the Bank of Commerce & Trust Company (R. 32, 35). Its charter authorized it to make abstracts of title to real estate, guarantee titles, and to acquire, own, and operate office buildings or other real estate (R. 33). Its initial assets, all of which were received from the Bank, consisted of a fifteen-story office building called the Commerce Title Building, all the stock ($100,000 par value) of an abstract company, and all the title records formerly owned and used by the Title Department of the Bank (R. 34). The organizers of petitioner considered that it was necessary to acquire the office building in order to recapture the title guaranty business formerly enjoyed by the Bank and in order to carry on a successful title insurance business (R. 41, 47–48).

During the tax years ending June 30, 1936, and June 30, 1937, petitioner engaged in three general types of activity, namely, the insurance of titles to real estate; the title abstract business; and the operation of the office building, most of the second floor of which was occupied by petitioner, the other floors being leased to other tenants (R. 33, 52). The title policies issued by petitioner consisted of those insuring purchasers of real estate against defects in the title thereto, and of those insuring mortgagees against defects in the title to real estate securing the mortgage debt (R. 34). Before issuing any policies petitioner obtained a certificate from the Insurance Commissioner of the State of Tennessee licensing it to conduct the business of title insurance, and has since furnished reports to, and been examined by, the Insurance Commissioner and has annually received certificates from the Commissioner authorizing it to conduct such business (R. 33).

From its three types of activity above mentioned petitioner derived income in the following proportions during the calendar years 1935–1937 (R. 39–40, 50–51):

	1935	1936	1937
	Percent	*Percent*	*Percent*
Title department	24.63	28.89	18.15
Abstract department	.....	12.96	23.61
Office building	75.37	58.15	58.24
	100.00	100.00	100.00

Substantial portions of its 1935 and 1936 income attributed to "Title Department" were derived from sources other than premiums, especially from dividends. Less than one-fifth of petitioner's total income was derived from premiums in either of those years or in 1937 (R. 39–40, 50–51). Its income attributed to "Abstract Department" and "Office Building" for each of the years was derived from fees and rents, respectively (*id.*).

In its returns for the taxable years petitioner sought exemption from the capital stock tax under section 105 of the Revenue Act of 1935, as amended, on the ground that it was an insurance company (R. 6, 18, 29, 31). Its requests for exemption having been rejected, it paid the taxes and brought this suit for refund (R. 6–7, 18–19, 29, 31). The District Court gave judgment for the defendant, holding that the petitioner was not an insurance company because its principal business was operating an office building rather than insuring real estate titles (R. 55, 56). The Circuit Court of Appeals affirmed (R. 169).

ARGUMENT

The courts below correctly held that petitioner should not be classified as an "insurance company" within the meaning of section 105 (c). Since petitioner claims an exemption by virtue of being within that specially excepted class, it "must be held liable for the capital stock tax unless clearly

shown to have been an insurance company within the meaning of the Act." *Bowers* v. *Lawyers Mortgage Co.,* 285 U. S. 182, at 187; *United States* v. *Home Title Co.,* 285 U. S. 191, 195.

No such showing has been made. On the contrary, the facts found by the District Court and not disputed by petitioner disclose that the major portion of petitioner's gross income during the years in question was derived from its operation of the office building (R. 39–40, 54–55). Even including all the income from the abstract department, which may or may not be allocable to petitioner's insurance activities, less than 42% of petitioner's total income was realized from the insurance business (*id.*). Cf. *Empire Title & Guarantee Co.* v. *United States,* 101 F. (2d) 69, 72 (C. C. A. 2). Accordingly, under the decisions in the *Lawyers Mortgage Company* and *Home Title Company* cases, *supra,* it could not be said that petitioner's "principal business" was insurance.

Petitioner asserts (Pet. 8–10, 13, 22) that a conflict exists between the decision of the court below and the decisions of this Court in the *Lawyers Mortgage Company* and *Home Title Company* cases in that the court below, in adopting the grounds of the decision of the District Court, held that the amount of income derived from premiums was determinative, whereas this Court applied the test of "the character of the business actually done

in the tax years," 285 U. S. at 188.[1] However, as is clear from the opinion of the District Court, the court below did not treat the amount of premiums as decisive, but, expressly applying the principles established by this Court, looked to the proportionate income realized from petitioner's various activities and concluded from those figures that "operating an office building and *not* insuring real estate titles was petitioner's principal business" (R. 54–55).

Petitioner apparently contends (Pet. 9–10, 20–21) that the income derived from the operation of the office building should have been treated as investment income allocable to its insurance business. But the operation of the office building, unlike the examinations, appraisals, and other services treated as incidental to the conduct of the insurance business in the *Home Title Company* case, cannot reasonably be subordinated to petitioner's insurance activity. This seems especially clear in view of the fact that less than 20% of petitioner's income was derived from premiums (R. 39–40). It would be extraordinary for an insurance company

---

[1] The Court held in the *Lawyers Mortgage Company* case that the taxpayer was not an insurance company so as to be exempt from the capital stock tax under a provision of the Revenue Act of 1921 virtually identical with that herein. In the *Home Title Company* case the Court held that the taxpayer was within the exemption, 75% of its income having been derived from insurance of titles and guaranties of mortgages and from services incident thereto.

to realize premium income in an amount less than the income from other sources. Even life insurance companies, which may be expected to realize a greater proportion of their income from investments than do other types of insurance companies, receive substantially more income from premiums than from investments. See Hearings before the Temporary National Economic Committee (1940), Part 10–A, pp. 6, 7.

CONCLUSION

The decision below is correct and there is no conflict. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
HELEN R. CARLOSS,
MICHAEL H. CARDOZO, IV,
Special Assstants to the Attorney General.

SEPTEMBER 1941.